IN THE
SUPREME COURT OF MISSOURI

No. SC 92291

WHELAN SECURITY CO.

Plaintiff/Appellant,

v.

CHARLES KENNEBREW, SR. and W. LANDON MORGAN

Defendants/Respondents.

Appeal from the Circuit Court
of St. Louis County
Honorable Maura B. McShane, Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT WHELAN SECURITY CO.

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INTRODUCTION

Appellant Whelan Security Co. ("Appellant" or "Whelan") submits this REPLY BRIEF to the SUBSTITUTE BRIEF OF RESPONDENT CHARLES KENNEBREW SR." ("Respondent's Substitute Brief") filed by Respondent Charles Kennebrew Sr. ("Respondent" or "Mr. Kennebrew"). Whelan addresses only certain issues. Insofar as no specific reply is made to other issues Respondent raises, Appellant avers that they are so clearly inaccurate or sufficiently addressed in BRIEF OF APPELLANT WHELAN SECURITY CO. ("Appellant's Initial Brief") that no reply is warranted.

ARGUMENT

I. APPELLANT'S REPLY TO RESPONDENT'S PRELIMINARY STATEMENT AND STATEMENT OF FACTS

Respondent misstates Whelan's position in his Preliminary Statement. He describes the covenants as "limitless." (Respondent's Substitute Brief, p. *ii*.) Not so. Even the most perfunctory reading of the Agreement belies this notion. (LF pp. 37-43, Kennebrew Agreement, ¶ 3).

Respondent proceeds to state that "denial of summary judgment is not appealable. Whelan has not appealed the denial of summary judgment. Rather, Whelan has appealed the Circuit Court's order granting summary judgment in favor of Respondent. It is Whelan's position that the restrictive covenants contained in Respondent's Agreement are facially valid (Point I). It is also Whelan's position that the Circuit Court erred in ruling that Mr. Kennebrew's Agreement was overly broad and not reasonable in that Mr. Kennebrew was shown to have engaged in conduct in violation of his Agreement (Point

II – non-competition, Point III – non-solicitation of customers, Point IV – non-solicitation of and employment of employees). Summary judgment in favor of Respondent was therefore, not proper.

The central issue under Point I of Appellant's Initial Brief is the facial validity of Mr. Kennebrew's Agreement under Missouri law. With respect to this issue, the Court need not examine specific facts and circumstances. If facts and circumstances are considered, however, Whelan is entitled to have the record viewed most favorably to it and to receive the benefit of all reasonable inferences. (Appellant's Initial Brief p. 21, fn. 3).

Respondent devotes a large portion of his Substitute Brief to controverted material facts. By doing so, he establishes that the entry of summary judgment was improper. Respondent argues that the Agreement was not applicable in Houston and this is a critical fact that Whelan disputes. Whelan has consistently maintained (and has in fact demonstrated) that the Agreement was intended to apply in Houston, but for purposes of Point I of this appeal, any oral communications concerning the geographical scope of Agreement are irrelevant in determining its facial validity. In any event, the Agreement includes an integration clause clearly invalidating any prior oral or written agreements. (LF pp. 37-43, Kennebrew Agreement, ¶ 11). *See Stein v. Stein Egg and Poultry Company, Inc.* 606 S.W.2d 203, 207 (Mo.App.E.D. 1980)(oral agreement does not prevail over written terms of noncompetition clause).

Respondent's statement of facts also contains egregious errors. Respondent mistakenly asserts that Whelan's owner, Greg Twardowski, admitted that the Agreement

has no geographical restrictions. (Respondent's Brief, p. 6). The Agreement expressly states that the non-competition (as opposed to the customer non-solicitation) covenant only prohibits "work for a competing business within a fifty (50) mile radius of any location where EMPLOYEE has provided or arranged for EMPLOYER to provide services." (LF pp. 37-43, Kennebrew Agreement, ¶ 3(c)). Mr. Twardowski's testimony referred to that portion of the Agreement dealing with the restriction on customer *solicitation*, not the non-competition provision. Similarly, Respondent asserts on appeal that he never made contact with Whelan clients in Houston, but the record indicates otherwise. (Respondent's Substitute Brief p. 51; Appellant's Initial Brief, pp. 6–7). In fact, Mr. Kennebrew, by his own admission worked with at least 10 clients in Houston (Appellant's Initial Brief pp. 6 – 7). Under the applicable standard of review, however, Respondent's factual assertions that contradict Appellant's testimony should be given no credence.

II. APPELLANT'S REPLY TO THE RESPONSE OF RESPONDENT TO POINT I

This Court very recently reaffirmed that non-competition agreements are proper in Missouri. *Western Blue Print Co., v. Roberts, et al.*, 2112 Mo. LEXIS 93 (April 17, 2012). The covenants contained in the Agreement were facially reasonable as to time and space and necessary. Respondent states that "the covenant would require Mr. Kennebrew to refrain from working in any capacity for any security business in most any major market in America, let alone his home in Houston," and "would require Mr. Kennebrew to know all of its business across America, including actual and prospective

employees and customers for both 12 months before and two years after he terminated his employment." (Respondent's Substitute Brief, p. 23).

This is a gross mischaracterization of the terms of the Agreement. Appellant has never argued for such an inaccurate interpretation.[1] The non-competition covenant on its face extends only for a radius of fifty miles from where Mr. Kennebrew provided services for Whelan, and Whelan has always acknowledged that under the terms of the Agreement, Mr. Kennebrew was free to compete with Whelan anywhere outside this fifty-mile radius, including much of Texas, without violating his Agreement. (Appellant's Brief, p. 37).

The non-solicitation provision does not require Respondent to have an encyclopedic knowledge of Whelan's prospective business. At most, it would only require a simple inquiry (which anyone seeking to do business with a new customer would likely make) whether Whelan is the customer's current provider or has sought its business within the last year. Respondent's personal beliefs as to what the requirements

[1] It should be emphasized that Whelan's challenge under Point I is to the Circuit Court's determination that the Agreement, as written, is invalid. Nevertheless, contrary to Respondents assertion, Whelan has never argued that the Circuit Court did not "hear the facts and circumstances of this case. (Respondent's Substitute Brief, p. 26).

of the covenants might somehow impose *in practice* have nothing to do with the reasonableness of the covenant as written.[2]

Respondent's attempt to distinguish *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71 (Mo. Banc 1985) fails. In *Osage Glass* the Missouri Supreme Court rejected the *reduction ad absurdum* analysis used by the Circuit Court and now asserted by Respondent. *Id.* at 74. The employer in *Osage Glass* had operations in five Missouri cities, including Kansas City, the only area in which the defendant had worked for the plaintiff. In upholding the validity of the non-competition covenant, the Supreme Court wrote, "We do not have to speculate about the enforceability of the covenant had the plaintiff accepted employment elsewhere in Missouri." *Id*. It is precisely the type of speculation that the Supreme Court cautioned against in *Osage Glass* that Respondent seeks to invoke in his defense. Neither the Circuit Court nor Respondent should have speculated about the reasonableness of the Agreement had Respondent gone to work outside of Texas. The "facts and circumstances" before the Circuit Court, according to the petition, did not deal with locations other than Houston, Texas. To be valid and enforceable, as written, a non-competition or non-solicitation covenant need only be

[2] Respondent should not be heard to complain that the Agreement's covenants are unreasonable because in it he expressly acknowledged that "the restrictions … are reasonable and necessary to protect [Whelan's] legitimate business interests …" (LF p. 40 ¶ 4).

reasonable. It need not be immune from conjecture about hypothetical situations beyond the written terms of the covenant or the petition's allegations.[3]

Despite citing the language of the Agreement that the non-competition covenant applies to a "fifty (50) mile radius of any location where EMPLOYEE has provided or arranged for EMPLOYER to provide services," Respondent draws the illogical conclusion that this language fails because it does not state a specific location. (Respondent's Substitute Brief, p 27). In support, he invokes his alleged oral communications with Mr. Todd McCullough, which have no relevance to the facial reasonableness of the Agreement. *See Stein*, *supra.* p. 2 The language of the Agreement makes clear that the prohibition applies only to a limited radius from those locations where Respondent has worked for Whelan. Respondent proceeds to misstate Whelan's position to be that the non-competition covenant applies to Houston *simply because it has a branch there.* (Respondent's Substitute Brief, p. 28 emphasis in original). Whelan has never asserted this; rather, it has asserted that the covenant applies because Mr. Kennebrew worked in Houston for Whelan. The covenant itself is clear and unambiguous regarding its geographic scope. The Agreement's language is even less restrictive than that in *Osage Glass* because it only limits Mr. Kennebrew from competing within the geographic area where he had worked for Whelan. This is facially

3 This case arose in the context of Respondent's work for Whelan in Houston, his competing work in this area, and his acquisition of Whelan clients and Whelan's employees – all juxtaposed against his voluntary resignation.

reasonable, regardless of whether or not Mr. Kennebrew now denies that he worked for Whelan in Houston.

Osage Glass bears directly on the reasonableness of the non-competition covenant, as written. The geographic scope of the covenant in *Osage Glass* applied to any competitive business within the State of Missouri, regardless of whether the defendant employee had worked anywhere other than Kansas City. By its terms, the non-competition covenant was broader than that at issue here. Moreover, *Osage Glass* cites approvingly to *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299 (Mo.App.E.D. 1980). The non-competition covenant in Orchard Container was for three (3) years and applied to "an area of Two Hundred (200) miles distant form any office or plant operated by the Company now or in existence at the time of termination." *Id.* at 301. The covenant set forth no specific location and imposed no requirement that the employee had worked for, or provided services at, any of the employer's locations. Observing that the record testimony in *Orchard Container* established that in addition to business in St. Louis the employer had solicited customers 125 miles from St. Louis, the appellate court concluded that it was appropriate to modify the geographic scope to 125 miles. Accordingly, a covenant of 50 miles of a location from where an employee has provided or arranged for an employer to provide services, as contained in Mr. Kennebrew's Agreement, is *as written*, not unreasonable. Furthermore, *Orchard Container* makes clear that a non-competition agreement does not fail simply because it designates no specific location (*i.e.*, by postal address or point on a map). Respondent's attempted

distinctions based on specific location are therefore meaningless. (Respondent's Substitute Brief, pp. 29 – 31).

Payroll Advance, Inc. v. Yates, 270 S.W.3d 428 (Mo.App.S.D. 2008) is inapposite to this case. The agreement in *Payroll Advance, Inc. v. Yates* was fundamentally different than the Agreement at issue. The agreement in *Payroll Advance, Inc.* restricted the former employee from competing within fifty miles of any branch office of Payroll Advance, not just those where she worked, unlike Mr. Kennebrew's Agreement. *Id.* at 436. *See also* Appellant's Brief pp. 37 – 39.

The customer non-solicitation covenant in the Agreement in the present case is also reasonable. Respondent mistakenly focuses upon the geographic limitation and whether an employee had contacts with the customer and creates irrelevant distinctions by using these two criteria interchangeably with the cases cited by Appellant. Missouri law, however, ignores Respondent's distinctions when evaluating non-solicitation covenants. *Nat'l Starch & Chemical Corp. v. Newman*, 577 S.W.2d 99 (Mo. App. K.C. 1978) along with the other cases referenced in Appellant's Initial Brief illustrate the established principle that a customer non-solicitation covenant is facially valid, even if it does not have a geographic limitation. (Appellant's Brief, p. 26 – 27).

Respondent takes the unfounded position that facially valid non-solicitation provisions must be limited to customers, geographic location, and clients actually contacted by the employee. Missouri law, however, holds differently. *Silver, Asher, Sher & McLaren, M.D.'s Neurology, P.C. v. Batchu*, 16 S.W.3d 340, 345 (Mo.App.W.D. 2000) and *Schott v. Beussink*, 950 S.W.2d 621 (Mo. App. 1997) both establish that a

limitation to customers contacted by an employee are not required for a facially valid non-solicitation covenant. *Silver* could not be more clear: "[a]n accepted method of limiting a post-employment restraint so as to be reasonable is to draft a covenant restricting the former employee from soliciting the former employer's clients." *Id*. At 345. Moreover, the non-solicitation agreement in *Silver* is nearly identical to Mr. Kennebrew's Agreement in that the *Silver* employee agreed to not "solicit, service, refer to handle any medical business or engage in the practice of neurology for any patient of Employer who was a patient of Employer on the date of the termination of physician's Employment with Employer." *Id.* at 343. Similar to Mr. Kennebrew's Agreement, the *Silver* non-competition covenant specifically applied a 75-mile restriction, but the non-solicitation portion of the *Silver* agreement did not include a geographic limitation.

Respondent misconstrues *Schott.* According to Respondent, *Schott* should be differentiated because it involved only "a small accounting firm with one office." (Respondent's Substitute Brief, p. 39). Respondent provides no meaningful explanation as to why the size of an accounting firm is relevant in determining the validity of a non-solicitation covenant. What is relevant, however, is that the court in *Schott* concluded that a two-year restriction against soliciting an employer's customers was enforceable, without a geographical restriction, because "the covenant does not prevent employees from practicing in any particular geographical area, it merely prohibits them from soliciting employer's clients." *Id.* at 627. The similarity between the covenant in *Schott* and in the present case warrants particular emphasis. The covenant in *Schott* stated:

> The Employee covenants and agrees that for a period of two (2) years after the termination of this Agreement that he as an individual or in conjunction with associates or as an employee of another corporation, accountant or firm or company of accountants, will not come directly or indirectly, solicit or do any tax, auditing, accounting, system, or related types of work of or for any of the clients of the Employer for whom the Employer has done business during the fifteen (15) month period preceding the termination of this Agreement, or with whom they were at that date in negotiation to do business.

Schott, 950 S.W.2d at 623.

Simply put, the court in *Schott* held that "the absence of a geographical limitation in this case does not render the restrictive covenant unenforceable." *Schott*, 950 S.W.2d at 623 and 627.

Any criticism that Whelan's covenant also applies to prospective customers is of no consequence, as Missouri law has also upheld covenants barring solicitation of prospective customers. *See e.g., Gelco Express Corp. v. Ashby,* 689 S.W.2d 790, 799 (Mo. App. W.D. 1985) (barring employee from "from directly or indirectly soliciting, diverting or taking any of [employer's] customers with whom it did business on January 31, 1984, or which it solicited within six months prior to that date"). Such a restriction is, therefore, facially reasonable and not overly broad, as an employer would be expected to

have a protectable interest in prospective clients that are being solicited by the employer. Whelan's language specifically refers to "prospective customer(s) whose business was being sought during the last twelve (12) months of EMPLOYEE's employment." Without such protections, an employee could capitalize on the resources, contacts, and solicitation efforts of an employer to obtain a new customer and steal them away based upon specialized information obtained by the employee while the employee was still employed.

The employee non-solicitation covenant, as discussed at length in Appellant's Initial Brief, is as written, valid under Missouri law. Respondent's Substitute Brief adopts the Circuit Court's unsupported view that prohibiting the interference with Whelan's employees for a period of two years unreasonably burdens Respondent with having to know all of Appellant's employees. This restriction on its face imposes no unreasonable burden. Such information is readily gleaned from a simple inquiry, commonly made in employment applications or resumes, about an applicant's current and recent employers. Reviewing a job application for this information is not an unreasonable burden. The employee non-solicitation provisions are consistent with Mo. Rev. Stat. § 431.202(1)(4). The Court of Appeals noted in passing on this issue: "The restrictive covenant in Whelan's agreement with Kennebrew against solicitation of Whelan's employees is not, as a matter of law, on its face unreasonable due to its two year duration." *Whelan Security Co., v. Charles Kennebrew,* Sr., 2011 Mo.App.LEXIS

1590, *6 (Mo.App.E.D. November 29, 2011).[4] Accordingly, the Circuit Court erred and the Agreement is facially reasonable, not overly broad and necessary to protect Whelan's legitimate interests.

III. APPELLANT'S REPLY TO POINTS II, III, AND IV OF SUBSTITUTE BRIEF OF RESPONDENT

Respondent's criticisms of Points II, III and IV are similar in nature, but Respondent misstates Whelan's position. The Circuit Court's granting of summary judgment was improper because in viewing the record in the light most favorable to Appellant, there are material facts in dispute, beyond the facial validity of the Agreement.

Notwithstanding the assertion of Respondent, Whelan has not appealed the denial of its motion for summary judgment. Rather, as noted previously, Whelan has appealed the Circuit Court's order granting summary judgment in favor of Respondent. With respect to Points II, III, and IV, it is Whelan's position that the Circuit Court erred in ruling that the Mr. Kennebrew's Agreement was overly broad and not reasonable because Mr. Kennebrew was shown to have engaged in conduct in violation of his Agreement (Point II – non-competition, Point II – non-competition, Point IV – non-solicitation of and employment of employees). Although Whelan submits that the evidence was sufficient to warrant summary judgment in its favor and requested the Court of Appeals

[4] The Court of Appeals observed that if this employee non-solicitation covenant were found to be unreasonable the Circuit Court could modify it to make it reasonable. *Id.* at footnote 2.

to instruct the Circuit Court to enter judgment based on the undisputed evidence, it has not appealed the denial of summary judgment.[5]

Insofar as Respondent maintains that he was entitled to judgment as a matter of law based on the record before the Circuit Court, this argument is meritless. (Respondent's Brief, pp. 49 – 52). Respondent asserts that he and Todd McCullough had orally agreed that the Agreement with its restrictive covenants applied only to Dallas. However, this is a disputed issue. The statements attributed to Mr. McCullough are inherently suspect and entitled to no consideration because he is aligned with Respondent.[6]

Respondent's argument for summary judgment also rests on a misinterpretation of Mr. Kennebrew's meeting with Whelan CEO Greg Twardowski. During this meeting,

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[5] While the Court of Appeals decision may now be void, it should be noted that the court had no difficulty concluding that Mr. Kennebrew engaged in misconduct that is at the root of this case - "Kennebrew actively solicited the business of Park Square Condominiums, a Whelan client in Houston in November and December 2009." *Whelan Security Co., v. Charles Kennebrew,* Sr., 2011 Mo.App.LEXIS 1590, *6 (Mo.App.E.D. November 29, 2011).

[6] The November 19, 2009 e-mail in which Mr. Kennebrew lays out his business plans, including his personal focus on Park Square, is sent to Mr. McCullough thereby suggesting his alignment with Mr. Kennebrew to Whelan's detriment. (Appellant's Initial Brief, pp. 9 – 10).

Mr. Twardowski expressly told Mr. Kennebrew that he had no objection to Mr. Kennebrew operating his security guard business in Houston provided he focus on that portion of the market not sought by Whelan and left Whelan's clients alone (and therefore did violate his non-competition covenant). Mr. Kennebrew assured Mr. Twardowski that he would honor his commitments and not work for or service Whelan's customers. (Appellant's Initial Brief, p. 8).

Respondent's assertion that Whelan did not have any customers in Houston with whom Mr. Kennebrew had dealings while at Whelan is factually inaccurate and misses the point. (Respondent's Brief, p. 53). Park Square was a client of Whelan with whom Mr. Kennebrew had a strong rapport both before and after he went to work for Whelan. Under these circumstances, Whelan is entitled to protect its business relationship with Park Square. (Appellant's Initial Brief, pp. 41 – 43). However, the extensive testimony referenced by Respondent and that referenced in Appellant's Initial Brief (p. 7), when viewed in the light most favorable to Whelan, demonstrate (at the very least) a material factual dispute, and the impropriety of the Circuit Court's decision to grant Respondent's motion for summary judgment.

Suggesting that Whelan provide information about all of its customers, prospective customers, and employees to assist Appellant in determining potential violations would be akin to giving Respondent a roadmap to potential clients as well as a referral source of employees, and would defeat the purpose of the covenants in the Agreement. Indeed, here the parties stipulated that such information is confidential. (LF pp. 37-43, Kennebrew Agreement, ¶ 1).

In adopting the Circuit Court's conclusion that the Agreement's restrictive covenants are unreasonable and inhibit the ability of Respondent to support his family, Respondent ignores his specific acknowledgments in the Agreement to the contrary. (LF pp. 37-43, Kennebrew Agreement, ¶ 4). For purposes of determining the reasonableness of the Agreement, Mr. Kennebrew's acknowledgments in the Agreement trump his later unsupported factual assertions to the contrary.

A. Appellant's Reply to Respondent's Response to Point II

Respondent's facts with respect to Point II are directly opposed by the testimony presented by Whelan and should receive no consideration, other than for denying summary judgment. For example, Respondent asserts that he did no work for Whelan in Houston. (Respondent's Brief, p. 32 and p. 35). This assertion is Respondent's justification for denying the Agreement's application to Houston. However, evidence adduced before the Circuit Court flatly contradicts this assertion. Mr. Kennebrew admitted that he had more than ten clients in Houston for Whelan with whom he had a very good rapport. He was also used on sales blitz in Houston because of his contacts there; he understood that Whelan wanted him to obtain business in Houston. In fact he did whatever tasks Whelan wanted him to do in Houston. (Appellant's Initial Brief, p. 6 and p. 7). Viewing this "factual dispute" in the light most favorable to Appellant establishes (at the very least) that summary judgment in favor of Respondent was improper. Similarly, Respondent's assertion that Whelan waived the non-competition covenant, which claim Whelan denies, reflects another controverted material. Mr. Porterfield's and Mr. Twardowski's discussions with Mr. Kennebrew after he submitted

in resignation in March 2009 in which they discussed Mr. Kennebrew's post-employment covenants, including the fact that Whelan's customers would be off limits, refute the notion that there was a waiver of these covenants. (Appellant's Initial Brief, pp. 7 – 8).

Responding further under Point II, Respondent asserts that if he "had minimal contacts with a client I California [sic]," he could not compete there, that the non-solicitation covenant is "so broad that it would prevent him from conducting a business of any kind, whether it was in competition with Appellant or not," and that the geographical restrictions are so severe as to restrict the ability of Respondent to support himself and his family. (Respondent's Brief, p. 36). Mr. Kennebrew's speculation about what might happen if he worked in California has no place in the Court's consideration of this appeal. In any event, the Agreement makes clear, that all of these assertions are without merit. The non-competition covenant applies only to a competing business within fifty (50) miles of a location where Mr. Kennebrew worked for Whelan, and it certainly does not prevent him from opening any other business not in competition with Whelan (*e.g.,* a flower shop, a hot dog stand or a security company targeting minority contracts, a sector of the security guard business in which Whelan did not compete in Houston). Indeed, Mr. Kennebrew at all times remained free to compete against Whelan outside this geographic limitation, with the sole caveat that for two years he refrained from soliciting Whelan's clients and prospective clients.[7] It simply cannot be said that the restrictions to

[7] Even in Houston, Whelan made clear to Mr. Kennebrew, the Agreement did not prohibit him from operating a security guard business in that portion of the market in which

which Mr. Kennebrew agreed would prevent him from conducting business of any kind. They do not – either as written or applied – stop him from conducting a security guard business in that portion of the market not sought by Whelan. Lastly, Mr. Kennebrew's lament that the Agreement restricts his ability to support himself and his family merits no consideration. This assertion has no factual support, and is contradicted by Respondent's express acknowledgement in the Agreement that enforcement would not prevent him from earning a living. (LF pp. 37-43, Kennebrew Agreement, ¶4(c)).

Respondent admits to contacts with Park Square in the fall of 2009 that culminated in his performing security guard work for this customer. (Respondent Substitute Response Brief, p. 10). He also admits that he had a relationship before he joined Whelan. (Respondent's Substitute Brief, p. 56). Mr. Kennebrew's "defense" that he had no relationship with Park Square while he worked at Whelan is meritless. Whelan was entitled to protect its relationship with Park Square from encroachment by Mr. Kennebrew regardless of whether Mr. Kennebrew relationship with this customer developed before or during his employment with Whelan. *See Naegele v. Biomedical Sys. Corp.*, 272 S.W.3d 385, 389. (Appellant's Initial Brief, pp 41—42).

B. <u>Appellant's Reply to Respondent's Response to Point III.</u>

Contrary to Mr. Kennebrew's assertion in reply to Point III, the evidence, particularly when viewed in the light most favorable to Appellant, establishes that

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Whelan did not seek business (*i.e.*, governmental contracts and/or minority subcontract/set-aside work).

Respondent solicited Whelan's customer, Park Square. This evidence included the following: Respondent's November 19, 2009 e-mail to associates stating his intention to personally focus on Park Square; his visits to Park Square in November 2009 before he took over the account; his leaving of a business card with Park Square's manager, Janice VerVoort; his December 2009 sales pitch to the Park Square Board of Directors; his submission of a proposal to provide security guard services to Park Square. (Appellant's Initial Brief, pp 9 – 11). Respondent's assertion (Respondent's Substitute Brief, p. 10) that he had no contact with Park Square until after Whelan's termination (a contraverted fact) is irrelevant. His solicitation of and work for Park Square would be violations of the restrictive covenants in his Agreement, whether or not he had contacts with this entity before or after Whelan's termination. *See Naegle*, 272 S.W.3rd at 389.

Respondent also argues that Park Square pursued him rather than *vice versa*, and that as a result he was privileged to service Park Square. (Respondent's Substitute Brief, p. 56-58). Although it appears certain that Mr. Kennebrew actively solicited Park Square, whether he was the fox or the hound for purposes of obtaining Park Square's business is irrelevant. Indeed, to accept the logic of Respondent's assertion that his conduct was permissible because Park Square pursued him would, as noted in Appellant's Initial Brief, would allow Park Square to determine the Agreement's enforceability. Missouri courts have rejected this argument, noting that the public's interest in choosing a particular service provider does not override a limited non-solicitation or non-competition covenant. (Appellant's Initial Brief, p. 45). Park Square

was a client of Whelan's, and Whelan was entitled to protect that relationship, regardless of the timing of Mr. Kennebrew's contacts with Park Square.

C. Appellant's Reply to Respondent's Response to Point IV.

Respondent solicited and hired Whelan's employees. In response to Point IV, Respondent states only that he did not solicit Whelan's employees. However, Appellant's Point IV is that Mr. Kennebrew violated his Agreement not only by soliciting Whelan's employees, but also by hiring them. Respondent's Agreement with Whelan prohibited the hiring as well as the solicitation of its employees. (LF pp. 37-43, Kennebrew Agreement, ¶ 3(b)). Respondent admits that he hired Whelan employees when he took over the Park Square account. (Respondent's Substitute Brief, p 11). The solicitation of Whelan's employees is also beyond dispute: Mr. Morgan, working for Mr. Kennebrew and his company met with and passed out applications to Whelan's employees at Park Square before Respondent's takeover. (Appellant's Initial Brief, pp. 11 and 12). The Circuit Court should not have granted summary judgment in favor of Respondent due to these material facts.

IV. APPELLANT'S REPLY TO THE RESPONSE OF RESPONDENT TO POINT V.

Respondent's argument in reply to Whelan's assertion that the Circuit Court abused its discretion in refusing to modify the Agreement is flawed for numerous reasons. First, the facts in *Payroll Advance* are so different than those in the present case, that Respondent's mere citation to language from this decision about a court's discretion to modify a non-competition or non-solicitation provision says nothing about whether or

not that the Circuit Court in the present case abused its discretion. Second, Respondent's assertion that the Circuit Court had good reason to decline Whelan's request is based on the faulty premise that the covenants do not apply to Houston and were intended to be restricted to Dallas. (Respondent's Substitute Brief, p. 44). The specific language of Agreement itself and the testimony of Mr. Twardowski demonstrate that the Agreement is not restricted to Dallas, and that the restrictive covenants applied to Houston, as well as Dallas. To decline modifying the Agreement, however, was an abuse of discretion in that Mr. Kennebrew plainly admitted that the Agreement was reasonable and necessary to protect Whelan's business interests. (LF pp. 37-43, Kennebrew Agreement, ¶ 4). For the Circuit Court to nullify the entire agreement, and afford Whelan no protection whatsoever, even after Appellant admitted the necessity of it, was an abuse of discretion.

PROPRIETY OF INJUNCTIVE RELIEF

At oral argument, the Court of Appeals inquired whether injunctive relief remains appropriate given that more than two years have elapsed, which is the length of the restrictive covenants in the Agreement, since Respondent last worked for Whelan (August 2009). Whelan submits that injunctive relief is still appropriate.

Whelan previously cited *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 649 (Mo.App.W.D. 1995) for the proposition that "enforcement of the applicable period from the date of the decree would not be inequitable." *Furniture Mfg. Corp.* specifically looked at the propriety of preliminary injunctive relief after the period fixed by the covenant had expired. Although noting conflicting authority on this point, the Court in *Furniture Mfg. Corp.* concluded that the better approach is that a restrictive covenant

should be tolled pending litigation because otherwise the aggrieved party is denied the benefit of its bargain. The holding of *Furniture Mfg. Corp.* has continued to find favor in Missouri courts. *See Wills v. Whitlock*, 139 S.W.3d 643, 657 (Mo.App.W.D. 2004)(filing of action tolls running contract period for seeking of injunctive action).

The rationale of *Furniture Mfg. Corp.* and *Wills* is compelling in the present case. Shortly after leaving Whelan in August 2009, Mr. Kennebrew violated his Agreement. Whelan immediately filed suit against him. Whelan's position was sufficiently persuasive that lower courts entered temporary restraining orders on January 13, 2010, February 2, 2010, and March 15, 2010. Through no fault of Whelan, the preliminary injunction hearing stretched over three sessions (June – September 2010). Whelan was then denied a preliminary injunction because the Circuit Court misapplied well-established Missouri law. Without injunctive relief, Whelan is denied any equitable relief.

CONCLUSION

Whelan requests that the Court reverse the Circuit Court's January 7, 2011 Order enter summary judgment for Respondents, and grant the relief previously requested. (Appellant's Initial Brief, pp. 51, 52).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies, pursuant to Supreme Court Rule 84.06, that the foregoing Appellant's Reply Brief complies with Rule 84.06 and Rule 360 and contains 3,873 words. As to the word count, Counsel relied upon the word processing system used to prepare this Brief (Microsoft Word). Further, counsel certifies that he is filing an electronic copy of this Brief, via e-mail to moapped@courts.mo.gov (in lieu of a floppy disk), pursuant to Rule 84.06 and E.D. local Rule 363. The e-mail was scanned for viruses and is virus free.

/s/Mark W. Weisman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served via the Court's Electronic Noticing System, on this 9th day of May 2012, to:

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